

OGC-84-52230

13 September 1984

Att. ER 81-80934,
OLL 84-2934

MEMORANDUM FOR: Director of Central Intelligence

FROM: Stanley Sporkin
General Counsel

SUBJECT: Letter to the Attorney General
Concerning FOIA Relief

STAT 1. Here is the new draft of the proposed letter to the Attorney General. We have incorporated the changes you made at this morning's meeting as well as certain additional changes which [] and I have included. The two paragraphs before the last paragraph are new and are intended to meet your suggestion that we deal with the various legislative options to demonstrate that the only viable course is the one we have adopted.

2. Pursuant to our discussions, [] has talked with both the Majority and Minority staff members of the Government Operations Committee to see what kind of commitment for government-wide FOIA relief can be obtained at this time. It is my view that it would be very helpful if we could get some kind of a commitment from the Government Operations Committee so that, when we go into our final bargaining session with Justice, we can put something on the table to indicate they will ultimately reach their objective for government-wide relief. Ernie believes that we may well come up with some kind of assurance at this time. Perhaps the best way to proceed in this regard would be to try to arrange to have Congressmen English and Kindness personally meet with you and the Attorney General to provide the Attorney General the assurance he needs. Bill, I truly believe this is the added element that may push our effort over the top.

STAT

[]
Stanley Sporkin

Attacment

cc: DDCI
ExDir
D/OLL

F-100

Central Intelligence Agency



Washington, D.C. 20505

ER 84-8093/1

13 SEP 1984

The Honorable William French Smith
The Attorney General
Department of Justice
Washington, DC 20530

Dear Bill:

I very much appreciate your taking the time to review with me our Freedom of Information Act legislation. I want you to know that I fully understand the equities of the Department and appreciate the benefits that you believe will flow in the event the Provenzano case is reversed by the Supreme Court. I have carefully considered our discussions and the persuasive arguments you made in our meeting. I am still of the opinion that it is wise to forgo the use of the uncertain Privacy Act exemption in order to seize right now the short-lived opportunity to establish a certain and permanent exemption for CIA's operational files.

Bill, this is very substantive relief for us. As I explained to you, under the pending legislation we will no longer have to search large segments of our operational files. This will provide us with the ability to convince liaison services and agents all over the world that they no longer need worry that helping the United States can lead to exposure and possible loss of life and reputation. This is a high priority for the Agency and the Administration.

As you know, the only way we were able to obtain the support of the Democrats in the House was by getting our adversaries to agree to the legislation. It is now likely that we will no longer be able to retain that support because the ACLU leadership is having serious internal difficulties with respect to its continued support. I have enclosed a copy of the recent New York Times piece which quite clearly indicates the second thoughts the ACLU has with respect to our bill.

I realize that Congressman English has put us into a very difficult position by the amendment he has introduced. It is particularly troublesome because there is strong bipartisan support for his position. I invite your attention to the enclosed statements of Congressmen Kindness, Horton and Erlenborn.

It is unfortunate that the introduction of this amendment puts our respective offices in an adversarial position, which, as you know, is contrary to the close harmony with which our offices have worked during these past four years. I do not like our Agency to be in opposition to your fine Department from which we have received first-class legal advice and splendid cooperation in many critical areas. I do think, however, that from the Administration's standpoint its overall interest would be best served by obtaining the FOIA relief even though it has the English amendment. I am quite mindful of your position and, before I decided to write this letter, I once again carefully reviewed the issues in Provenzano and the other relevant cases.

I do understand the point you made concerning the benefits which you believe will be derived from the position you are espousing; namely, (1) the FBI need no longer search files in certain designated important categories, and (2) by eliminating this search the FBI will reduce its chances of inadvertently disclosing protected informants. All of this, of course, presupposes that the Supreme Court will rule in the government's favor. While you recognize the strong sentiment in the Congress to eliminate the privacy exemption, you believe it is not strong enough to override the President's veto of such a bill if one is enacted. It seems to me that a Presidential veto of such legislation would make it extremely unlikely that the Congress will consider any government-wide FOIA relief legislation in the near future. On the other hand, winning relief from the FOIA this month should add momentum to the broader bill we all want.

While I may not have captured all of your thoughts, I believe those I have listed are the salient ones. I have considered them against the fact that you are prepared to give up your opposition to the (b)(3) amendment when you obtain enactment of your own government-wide FOIA relief legislation, which is likely to come early in the next Congress, and the important benefits we are able to achieve now if our bill is enacted. These benefits are considerable and I believe will be lost to us if this law is not enacted at this point. I would not be soliciting your help if I thought that invoking the Privacy Act exemption was the only way the FBI could protect its vital information and sources. But, as you know, the FOIA exemption substantially gives you much of the same protection that the privacy exemption does with the exception of the need to review the files. Under exemption (b)(7) of the FOIA, the Bureau is able to protect its information and sources, although in order to do so it must first review those files. I realize this adds to the burden of the Bureau and needs to be weighed against the relief we will obtain from our proposed legislation, which will not only reduce file review by

experienced case officers, but also send a signal highly beneficial to the intelligence cooperation we get from agents and friendly intelligence services around the world.

I have carefully considered the various options as to how best to proceed with our proposed legislation and I am convinced that acceptance of the bipartisan House bill is the only way to ensure passage of the legislation before Congress adjourns next month. The suggestion that the Administration seek to knock out the (b)(3) amendment in conference in my view will fail. The House bill represents a strong bipartisan effort and commitment that the bill will be enacted only on condition that the amendment remains in the final legislation. I am particularly concerned that, if we deviate from the course on which we are now proceeding, time will run out and we will ultimately be unsuccessful in our efforts. Indeed, it is my considered judgment that the Administration's withdrawal of support for this bill will hurt its relationships with those Members of the House Permanent Select Committee on Intelligence and the Committee on Government Operations who have extended themselves in providing us with their support in this important endeavor, and ultimately cause them to lose enthusiasm for the Administration's effort for government-wide relief under the FOIA.

As you know, time is of the essence and I am simply not prepared to enter an uncharted course where we risk a strong possibility of losing this important opportunity for immediate FOIA relief. The legislation is now scheduled to be passed under suspension of the rules of the House and the abbreviated consent calendar procedure of the Senate. It would be embarking on a dangerous course to proceed differently at this precarious time.

I again urge you to carefully consider the respective merits of our positions and I seek your help and counsel in formulating the best way of obtaining the assistance we need to obtain this vital legislation.

Sincerely,

/s/ William J. Casey

William J. Casey
Director of Central Intelligence

Enclosure

OGC:SS/sin (13 Sep 84)

Distribution:

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- 1 - DCI
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9 September 1984

A.C.L.U. Reviews Support of Information Bill

By DAVID BURNHAM

Special to The New York Times

WASHINGTON — The American Civil Liberties Union is reviewing its support for legislation that would exempt most of the operational files of the Central Intelligence Agency from requests under the Freedom of Information Act.

Norman Dorsen, president of the civil liberties group, said the decision to study the bill further was reached after a lawyer representing the southern California affiliate of the organization detailed his opposition at an Aug. 18 meeting of the union's executive committee. The meeting followed a

vote by the California affiliate several months ago to oppose the national group's position on the issue.

The intelligence agency and the liberties union have both testified in support of the House version of the bill, and this harmony has played a major role in the bill's progress through Congress.

The California affiliate's objections center on provisions in the bill that it contends would almost eliminate the right of Federal judges to review administrative decisions of the C.I.A.

A second criticism is the belief that if the proposal wins Congressional approval, a number of other intelligence and law-enforcement agencies would request the same kind of exemption from the information act, a law establishing the general principle that the public has the right to read almost all Government documents.

Ira Glasser, executive director of the national A.C.L.U., said he had asked lawyers in and outside his group who specialize in cases of freedom of information to assess these objections. "I'm trying to do a serious review of their claim," he said. "This is a process that is quite normal."

Mr. Glasser said the review would involve the three lawyers who act as the A.C.L.U.'s general counsel.

Mark Lynch, an expert for the civil liberties group on the freedom of information law, characterized the review as a preliminary inquiry. He said the group would reconsider its stance on the bill only if the criticism was found to be merited.

"It is unlikely there can be any criticism that has not been considered," he said.

The legislation exempting the intelligence agency from some provisions of the information act has been approved by the House Intelligence Committee and the House Government Operations Committee. It may come to the floor soon under a procedure that requires approval of two-thirds of the members to pass. The Senate already has passed its version of the bill.

Under current law, the intelligence

agency is required to search all of its files when it gets a request under the Freedom of Information Act. The agency is then permitted to delete certain kinds of classified information. Under the House proposal, the agency would be excused from searching several specific files from which information is rarely, if ever, released.

Supporters of the legislation contend that by exempting the C.I.A. from making what are usually fruitless searches, long delays in answering other requests would be reduced. Critics, however, argue that if the legislation becomes law, the intelligence agency would avoid disclosure of more and more information by placing it in exempted files.

Mr. Glasser said that if the questions raised by Meir Westreich, an Orange County lawyer representing the organization's southern California affiliate, were found to be valid, he would withdraw the union's backing.

"If everyone convinces me that we were all wet in our first position, that's the end of it," he said in an interview.

Mr. Glasser said the general counsel, Frank Askin, a law professor at Rutgers University; Lawrence Herman, a law professor at Ohio State, and Harriet Pilpel, a lawyer in private practice in New York City, were trying to complete their review quickly.

The legislation has not attracted wide criticism. Among those who opposed it, however, were Jack Landau of the Reporters Committee for the Freedom of the Press and Samuel R. Gammmon, a former ambassador who spoke for the American Historical Association.

STATEMENT OF THE HONORABLE JOHN N. ERLBORN ON JULY 31, 1984
HOUSE COMMITTEE ON GOVERNMENT OPERATIONS MARKUP OF H.R. 5L64

MR. CHAIRMAN, I WOULD JUST LIKE TO ADD MY SUPPORT FOR THIS BILL AND PARTICULARLY THE AMENDMENT TO CLARIFY THE RELATIONSHIP BETWEEN THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT. AS ONE OF THE AUTHORS OF THE PRIVACY ACT AND THE 1974 AMENDMENTS TO THE FREEDOM OF INFORMATION ACT, I HAVE BEEN TROUBLED TO SEE A COUPLE OF CIRCUIT COURTS OF APPEALS RENDERING DECISIONS WHICH ARE CONTRARY TO THE GOALS OF THOSE TWO ACTS. EVEN MORE TROUBLING WAS THE RECENT DECISION OF THE JUSTICE DEPARTMENT AND OFFICE OF MANAGEMENT AND BUDGET TO REVERSE THE POLICY GUIDANCE AND REGULATIONS WHICH HAVE BEEN IN EFFECT SINCE THE PRIVACY ACT TOOK EFFECT IN 1975. THIS REVERSAL OF POLICY HAS THE EFFECT OF RESTRICTING AN INDIVIDUAL'S ACCESS TO GOVERNMENT FILES CONTAINING RECORDS ABOUT HIM OR HERSELF IN A WAY NOT CONTEMPLATED BY THE CONGRESS IN 1974.

SO, I CONGRATULATE AND THANK THE SUBCOMMITTEE FOR TAKING THE ACTION THEY DID AND I URGE MY COLLEAGUES TO REPORT THIS BILL AS AMENDED AND TO VOTE FOR IT WHEN IT COMES TO THE FLOOR LATER IN THE SESSION.

MR. CHAIRMAN, I, TOO, WOULD LIKE TO EXPRESS MY SUPPORT FOR H.R. 5164. THIS LEGISLATION HAS RECEIVED THE CLOSEST POSSIBLE SCRUTINY FROM THE SENATE, THE HOUSE INTELLIGENCE COMMITTEE, THIS COMMITTEE AND THE PARTIES MOST IMMEDIATELY AFFECTED BY ITS PROVISIONS, THE CIA AND ORGANIZATIONS SUCH AS THE ACLU WHICH REPRESENT PERSONS WHO MAKE REQUESTS FOR INFORMATION IN CIA FILES. THE OVERSIGHT PROVISION ADDED BY THE SUBCOMMITTEE WILL GIVE THE CONGRESS A TIMELY AND RELEVANT TOOL TO EVALUATE WHETHER THIS BILL IS ACHIEVING THE GOALS SET FOR IT. AS FOR THE OTHER AMENDMENT----- WHICH I HAVE ALSO COSPONSORED AS AN ORIGINAL BILL, WE ARE SIMPLY MAINTAINING THE STATUS QUO WHICH EXISTED BEFORE THE JUSTICE DEPARTMENT AND OMB UNWISELY REVERSED LONG-STANDING POLICY GUIDANCE. SO, I AM GLAD TO SUPPORT THE BILL AND URGE MY COLLEAGUES TO DO LIKEWISE.

REMARKS OF HONORABLE THOMAS N. KINDNESS

Subcommittee on Government Information markup of H.R. 5164

Central Intelligence Agency Information Act

Mr. Chairman, I would like to express my support for the bill with the amendments you have just described and urge my colleagues to do likewise.

I would also like to add a few comments for the record on the third amendment you described, that is the content of a bill which I have cosponsored with you and Messrs. Brooks, Horton, and Erlenborn, H.R. 4696.

I think it is appropriate that we in the Congress act to clarify the relationship between the Freedom of Information Act and the Privacy Act and that this legislation is an appropriate vehicle in which to do that.

As one who has been involved in efforts to amend the Administrative Procedure Act over recent years, efforts which have been referred to as "regulatory reform", I am perhaps particularly troubled by agencies reversing longstanding regulations or policy guidance where there has been no change in the underlying statute by the Congress or no change in the circumstances. And, if some courts do not interpret the statutes as we in the Congress intended, I believe it is incumbent upon the Congress to clarify the law, removing any ambiguity which may exist.

This is an appropriate vehicle in which to make this clarification. The issue is clearly raised by this legislation. And, one need not, and should not, harbour feelings of mistrust toward the CIA in order to see the issue as it is raised in section 701(c)(1).

I understand that there is a Supreme Court case pending to resolve differences between several circuit courts of appeals on this issue of statutory interpretation. We in the Congress should save them the trouble and clarify the law on this point.

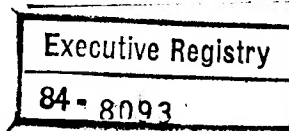
The Justice Department some time ago expressed its opposition to the action we take today. But we told them not to change the policy in the first place. That advice or guidance was offered without charge, and free advice at times is not considered very valuable. I think it is time, however, that the Department learned that the actions such as it took, reversing longstanding policy, jeopardize enactment of any Freedom of Information Act legislation, even this bill.

Mr. Chairman, I urge adoption of the amendment in the nature of a substitute, the bill as amended, and yield back the balance of my time.

Central Intelligence Agency



Washington, D. C. 20505



10 September 1984 *Att.*

OLL 84-2934

The Honorable Joseph Wright
Deputy Director
Office of Management and Budget
Washington, D. C. 20503

Dear Joe,

Here is a copy of my letter to the Attorney General on the high national interest in having the CIA operational files exempted from the Freedom of Information Act (FOIA).

I strongly believe that the continuing use of the Privacy Act as an FOIA exemption in law enforcement is of far lesser significance than the impact that exemption of CIA's operational files in relieving liaison services and agents all over the world from the worry that helping the United States can lead to the loss of sources and risk of lives and reputations would have.

I am told that the important law enforcement interest can be met by asserting the exemptions already provided in the FOIA.

I also understand that if the Supreme Court approves the continued use of the Privacy Act as an FOIA exemption, Congress is almost sure to enact legislation to take it away.

Thus, we risk a major achievement for the Administration in obtaining the relief from the FOIA it has set as one of its goals in order to save a doubtful exemption, which is of little added value and which is not likely to last very long in any event.

On the basis of confidential discussions with the FBI last week, I believe that you will find the use of the Privacy Act as an exemption has not been either frequent or significant.

The attached clipping from the New York Times confirms our view that if we are going to get this achieved it will have to be done during this next week or two.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill".

William J. Casey
Director of Central Intelligence



Attachments

OLL 84-2934

Distribution: 1 Each: DCI, DDCI, EXDIR
D/OLL, DDA, C/IPD
OGC, CDO/OGC, ER File

F-100

Central Intelligence Agency



Washington, D. C. 20505

OLL 84-2934

6 September 1984

The Honorable William French Smith
The Attorney General
Washington, D. C. 20530

Dear Bill:

I write you on a matter on which our staffs are working and which is of high importance to our security interests. I bring it to your attention now because time is short and we may need to go over it together.

As you know, we have been trying for the last six years to obtain legislative relief from the unique burdens we face under the Freedom of Information Act (FOIA). We now are on the verge of obtaining this essential relief.

The pending legislation would bring major benefits to our national intelligence effort. It would remove from the search and review provisions of the FOIA large segments of our operational files, thereby allowing the CIA to provide greater assurances of confidentiality to our foreign sources and liaison services and releasing many of our most experienced officials from involvement in FOIA processing. It would also enhance the maintenance of compartmentation of CIA information, which is a principle crucial to the success of sensitive intelligence operations. The Administration, including the Department of Justice, has extensively examined and approved the proposal that CIA seek separate legislation for FOIA relief and the President has personally given his support.

Our legislation was unanimously passed by the Senate late last year. The House Permanent Select Committee on Intelligence amended the bill and unanimously reported it earlier this year. Representative Glenn English, Chairman of the House Government Operations Subcommittee on Government Information, Justice and Agriculture, then made the addition of an amendment to the Privacy Act a prerequisite for Subcommittee action on the legislation. This amendment simply states that the Privacy Act cannot be used as a withholding statute under exemption (b)(3) of the FOIA.

We understand that it is a matter of some concern to the Department of Justice because it would be contrary to the revised policy guidance given by the Department of Justice on the use of the Privacy Act as a (b)(3) exemption and because this very question is awaiting decision by the United States Supreme Court. On the other hand, we have been informed that the Department of Justice will withdraw its objections to Representative English's amendment to our bill if a satisfactory agreement can be reached on a substitute bill for S. 774, the government-wide FOIA relief bill. I understand that negotiations are currently under way to achieve this compromise.

The Administration may have to evaluate the prospects and the relative value of getting CIA's sensitive operational files exempted against preserving Justice's ability to use the Privacy Act to exempt some files from demands under the Freedom of Information Act. The considerations from the CIA standpoint are:

- a. Our operational files will no longer need to be searched.
- b. Our foreign sources and liaison services would have greater assurance that we can preserve their confidentiality.
- c. Some of our most able and experienced officers could turn from FOIA processing to gathering intelligence. The Agency can use only high caliber personnel to protect sources included in its operational files.
- d. While the relief pertains only to the CIA records at this time, it certainly is a blueprint for other agencies in the Intelligence Community to obtain similar relief in the near future.
- e. It is extremely important for the Agency and its personnel to continue the momentum on the legislative front which started with the passage of the Classified Information Procedures Act in 1982 by obtaining this legislation as opposed to allowing this hard fought effort to go down the drain without any appreciable results.

Bill, this is a critical issue for this Agency. We urgently need this relief from the FOIA. It would represent an auspicious start in achieving a goal to which this Administration has been committed since its inception. If we do not get enactment of this legislation in this Congress, the chances of its enactment over the next several years are slim. As a result of the successful adoption of Executive Orders 12333 and 12356 and passage of the Intelligence Identities Protection Act of 1982, this Administration has built up a positive regulatory and legislative momentum in the national security arena which would be severely impacted if we failed to obtain enactment of the FOIA legislation in this Congress. I believe with time running out in this session of the Congress it is essential we resolve this quickly.

Sincerely,



William J. Casey
Director of Central Intelligence

ARTICLE APPEARED
ON PAGE A-24

NEW YORK TIMES
9 September 1984

A.C.L.U. Reviews Support of Information Bill

By DAVID BURNHAM

Special to The New York Times

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vote by the California affiliate several months ago to oppose the national group's position on the issue.

The intelligence agency and the liberties union have both testified in support of the House version of the bill, and this harmony has played a major role in the bill's progress through Congress.

The California affiliate's objections center on provisions in the bill that it contends would almost eliminate the right of Federal judges to review administrative decisions of the C.I.A.

A second criticism is the belief that if the proposal wins Congressional approval, a number of other intelligence and law-enforcement agencies would request the same kind of exemption from the information act, a law establishing the general principle that the public has the right to read almost all Government documents.

Ira Glasser, executive director of the national A.C.L.U., said he had asked lawyers in and outside his group who specialize in cases of freedom of information to assess these objections. "I'm trying to do a serious review of their claim," he said. "This is a process that is quite normal."

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"It is unlikely there can be any criticism that has not been considered," he said.

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"If everyone convinces me that we were all wet in our first position, that's the end of it," he said in an interview.

Mr. Glasser said the general counsel, Frank Askin, a law professor at Rutgers University; Lawrence Herman, a law professor at Ohio State, and Harriet Pilpel, a lawyer in private practice in New York City, were trying to complete their review quickly.

The legislation has not attracted wide criticism. Among those who opposed it, however, were Jack Landan of the Reporters Committee for the Freedom of the Press and Samuel R. Gammon, a former ambassador who spoke for the American Historical Association.

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